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Viewing cable 09CARACAS1569, Sorting Out the Cedeno Story

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Reference ID	Created	Released	Classification	Origin
09CARACAS1569	2009-12-17 23:56	2011-08-30 01:44	CONFIDENTIAL	Embassy Caracas

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C O N F I D E N T I A L SECTION 01 OF 05 CARACAS 001569

SIPDIS

E.O. 12958: DECL: 2034/12/17

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SUBJECT: Sorting Out the Cedeno Story

REF: 09 CARACAS 1553; 09 CARACAS 1537; 09 CARACAS 1509 09 CARACAS 1491; 09 1555

CLASSIFIED BY: Robin D. Meyer, Political Counselor, State, POL; REASON: 1.4(B), (D)

¶1. (C) Summary. The December 10 release of imprisoned banker Eligio Cedeno and the immediate detention of Judge Maria

Lourdes Afiuni, who ordered his release, have merged two issues: corruption by Chavez insiders and the politicization of Venezuela's judicial system. Embassy recommends a principled position on due process issues but the avoidance of statements regarding the particulars of specific charges. If not, Embassy cautions that we could fall into a trap whereby the Venezuelan government (GBRV) makes it appear that the United States is in collusion with corrupt bankers. Embassy believes at least seven bankers being sought in connection with recent banking scandals are in the United States. End Summary.

Who is Cedeno and What Has He Allegedly Done?

¶12. (C) Eligio Cedeno is the former president of several banks, including Banpro, Banco Bolivar, and Banco Canarias. He was charged, along with Gustavo Arraiz, in November 2005 with embezzlement ("distraccion de recursos financieros") in the case of Microstar. The Prosecutor's Office alleged irregularities in the authorization of USD 27 million to Microstar by CADIVI (Currency Administration Commission) for the import of computers that allegedly never entered the country. At the time, Cedeno was the owner of the bank through which Microstar solicited the dollars from CADIVI, and Arraiz was Microstar's representative. Cedeno and Arraiz were detained in February and March 2007, respectively. Their trial was annulled in May 2009 at the request of the Public Ministry. The detention order against Cedeno was reinstated while the case was reinitiated. In October, the Appeals Court for Caracas ordered Cedeno's release because his detention had exceeded the two-year maximum (see para 13 below). The Public Ministry appealed the release order to the Constitutional Committee of the Supreme Court and prevailed. The Court reportedly extended the period of permissible detention until July 2010.

¶13. (C) Views vary regarding the legitimacy of the underlying accusations against Cedeno. In an interview with "El Mundo Economico y Negocios" in October 2009, Cedeno said he believed his arrest was related not to the Microstar case, where he claimed there was no evidence of any damage to the bank, but to his alleged assistance in the escape from the country of union leader Carlos Ortega, who being investigated on corruption charges. According to Cedeno, "since they could not prove that I paid for his escape, well they said, 'open a case against him and detain him.'" Human rights attorney Carlos Ayala told Polcouns on December 14 that two former prosecutors involved in Cedeno's case were now in Miami, where they reportedly had filed affidavits claiming they had been ordered to prosecute Cedeno regardless of the facts. However, Embassy is aware that there may be information linking Cedeno to criminal activities, including the illicit acquisition of two banks.

Assessing Judge Afiuni's Decision to Release Cedeno

¶14. (C) On December 10, Judge Afiuni convened a hearing on the embezzlement charges against Cedeno. According to press reports, the two prosecutors involved in the case notified her that they could not attend because of their required attendance at another hearing on the bankers detained in connection with the recent banking scandal (reftels). Judge Afiuni decided to defer the hearing. However, she then considered Cedeno's defense attorneys' request to revoke Cedeno's detention order. They reportedly presented her with the opinion of the UN Task Force on Arbitrary Detention, which argued that Cedeno's detention was a violation of due process because of the repeated trial delays due to government inaction and because his detention exceeded two years. Judge Afiuni agreed to his release but prohibited him from leaving the country, required him to surrender his passport, and required him to appear before her every 15 days.

¶15. (C) According to press reports, about twenty minutes after Cedeno's departure from the courthouse, DISIP agents appeared and detained the judge and two sheriffs, Rafael Rondon and Carlos Lotuffo. DISIP agents later searched Cedeno's residence and detained one of his attorneys, Jose Rafael Parra Saluzzo, who was planning to leave the country, presumably for the holidays. They also later issued an arrest warrant for Cedeno as a fugitive. Cedeno's attorney was released later that same day, while the sheriffs were released conditionally on December 14 following protests by the sheriffs' organization. The two sheriffs are

charged with corruption, aiding in the evasion of justice ("favorecimiento para la evasion"), and conspiracy ("asociacion para delinquir").

¶16. (C) Judge Afiuni is being held in the DISIP facility, Helicoide, pending her transfer to the women's detention facility ("Instituto Nacional de Orientacion Feminina," INOF). Judge Afiuni's attorney has requested that she not be transferred because of concerns that women she might have sentenced might harm her. In a December 15 interview on the official VTV television, Attorney General ("Fiscal") Luisa Ortega Diaz said that Judge Afiuni had committed many procedural irregularities and questioned the "inordinate haste" with which she had acted to authorize Cedeno's release. The government charged Judge Afiuni with corruption, abuse of authority, aiding in the evasion of justice, and conspiracy. To date, only circumstantial evidence has been reported in the press to justify those charges, specifically, the allegation that the judge herself took Cedeno out the back exit of the courthouse to a waiting motorcycle (see para 8 below).

¶17. (C) There are different views on the facts and law involved in Cedeno's release and the judge's imprisonment:

* Contact with Lawyers: Attorney General Ortega alleged that Judge Afiuni had violated Article 12 of the Penal Code by having contact with one of the parties without the presence of the other parties to the case. The President of College of Attorneys, Ivette Lugo, publicly argued that Article 264 of the Penal Code, which deals with the review of a detention order, does not require the presence of the Public Ministry.

* Pre-Trial Detention: Cedeno's attorneys argue that his continued detention contravenes Article 244 of the Penal Code that establishes a maximum two-year period for pretrial detention. The President of the College of Lawyers said that Cedeno's detention violated Article 244 because it exceeded two years. In contrast, Attorney General Ortega noted in the December 15 interview that Article 244 also provides for extensions to that two-year maximum for "serious cause" and that the Appeals Court had in fact granted a 16-month extension.

* Release Order ("Boleta de Excarcelacion"): Some press reports quoted Cedeno's attorneys as saying that Judge Afiuni signed and issued a release order before Cedeno left the courthouse. Some reports cited the sheriffs as saying that the judge had said she was going to issue the order. PSUV National Assembly Deputy Escarra said on December 15 that the judge had issued the release order. However, Attorney General Ortega said in the December 15 interview that no such required release order had been issued.

* Cedeno's Departure from the Courthouse: Some press reports claimed that Cedeno left the courthouse through the main entrance. However, most later press reports said he immediately departed the courthouse through the judges' private elevator, through a garage, and out a back exit, where a motorcycle was waiting for him. Some reports say that Judge Afiuni personally accompanied him to the back exit and to the waiting motorcycle.

* Sheriffs' Arrest: The sheriffs argue they were just following judge's orders in permitting Cedeno's departure. Attorney General Ortega, however, accused them of violating procedures by not requiring the release order before permitting Cedeno to leave the courthouse.

* Judge's Imprisonment: President Chavez and Attorney General Ortega initially focused on the fact that Judge Afiuni made the release decision without the participation of the prosecutors and thereby had impermissible contact with one of the parties to the case. According to Article 86 of the Penal Code, recusal is the prescribed sanction for judges who, *inter alia*, have "maintained directly or indirectly, without the presence of all of the parties, any kind of communication with any one of them or their lawyers, about the matter submitted for his knowledge."

¶ 8. (C) In a television and radio broadcast on December 12, President Chavez called for Judge Afiuni's imprisonment for 30 years to set an example for other judges. "This judge is a criminal, everything was prearranged, the judge violated the law because she called Cedeno to a hearing without the presence of the representatives of the Public Ministry and took him out by the back door." He demanded that the Attorney General ensure that the judge and all those involved pay with "the full force of the law" and said "it is more serious that the judge frees a criminal than the criminal himself." President Chavez also asked the National Assembly to pass a law to prevent similar judicial actions in the future.

¶ 9. (C) President Chavez' PSUV Party (United Socialist Party of Venezuela) announced on December 15 that it would propose in the National Assembly the creation of an inter-branch ("interpoderes") commission to evaluate judges. PSUV Deputy Escarra explained that the commission would go beyond the specific case of Judge Afiuni to clean up the system "that still in great measure is in the hands of mafias who have distorted justice and fertilized the ground with impunity." According to Escarra, the Commission "will do an exhaustive evaluation of each and every judge and reinvigorate the judiciary. It is necessary to combat this kind of conduct by this judge and others who buy million dollar homes" with their salaries.

¶ 10. (U) On December 15, Public Defender Gabriela Ramirez said that the investigation into Cedeno's release should include all those officials behind this case and who were complicit.

The Backlash against the Judicial Attack

¶ 11. (U) The College of Lawyers, opposition political parties, and NGOs have protested the continued detention of Judge Afiuni and called for her immediate release. The spokesperson for the College of Lawyers said the case of "makes clear the breakdown of the rule of law and of the principle of the separation of powers." The Venezuelan press reported the statements of the UN Task Force on Arbitrary Detention, in which they accused the government of Hugo Chavez of "creating a climate of terror in the judiciary" with the goal of "undermining the rule of law." The papers also quoted them as saying that the Cedeno case demonstrated the interference of the executive branch in the judiciary. They called the arrest of the judge a "strike by President Hugo Chavez at the independence of the judges and lawyers of the country."

Relevant Provisions of the Penal Code (informal translation)

¶ 112. (U) Relevant Provisions of the Penal Code include:

* "Article 243: Liberty (Estado de Libertad): Everyone accused of participating in a punishable act shall remain in freedom during the trial except in exceptional circumstances established by this Code. The deprivation of liberty is a preventive measure that shall only be applied when other preventive measure are insufficient to assure the purposes of the trial."

* "Article 244. Proportionality. No coercive measure shall be ordered when such a measure appears disproportionate in relation to the gravity of the crime, the circumstances of its commission and the likely sanction.

In no case shall it exceed the minimum penalty established for each crime nor exceed a period of two years. In exceptional circumstances the Public Ministry or the plaintiff may request the officiating judge ("juez de control") an extension that shall not exceed the minimum sentence established for the crime . . . when there exists serious causes ("causas graves") that justify it, which shall be duly explained by the prosecutor or the plaintiff. In this case, the officiating judge shall convoke the accused and the parties to an oral hearing with the goal of deciding, taking into account, with the objective of establishing the period of the extension, the principle of proportionality."

* "Article 264. Review. The accused may seek a revocation or substitution of the judicial measure of preventive detention as many times as he may consider it pertinent. In any case, the judge shall examine the necessity of maintaining the preventive measures every three months and when he considers it appropriate may

substitute less serious measures. The denial by the court of a revocation or substitution is not appealable."

Context: Wider Banking Scandal

¶13. (C) Between November 20 and December 11, the GBRV closed 8 banks associated with government insiders (Banpro, Banco Canarias, Banco Bolivar, Banco Confederado, Central Banco Universal, Banco Real, Baninvest, and Banorte) (refs a-d). Cedeno is the former president of three of these banks, Banpro, Banco Canarias, and Banco Bolivar. According to press reports, 10 bankers are being detained, another 28 detention orders have been issued, 9 Interpol red alerts have been requested by the GBRV, and 15 people have been prohibited from leaving the country. Embassy understands that about eleven people being sought are believed to have left the country, of whom seven are believed to be in the United States.

Comment

¶14. (C) While it seems that Cedeno's incarceration may have exceeded Venezuelan legal norms, the Embassy is not in a position to evaluate the underlying merits of the government's original case against Cedeno, the circumstances of his release from detention, or the legal arguments regarding the correctness of the judge's decision under Venezuelan law. The Embassy notes that the timing of Cedeno's release and the banking scandal may be coincidental. However, the factual, legal, procedural, and public diplomacy issues raised in the Cedeno case are likely to arise again in the cases of the individuals involved in the recent banking scandal. For this reason, Embassy urges the Department to avoid statements on the particulars of specific charges. Such statements could lead us into a trap whereby the Venezuelan government makes it appear that the United States is in collusion with corrupt bankers. President Chavez would likely relish the opportunity to make such an accusation.

¶15. (C) However, Embassy strongly believes that the politicization of the judicial process -- as evidenced by President Chavez' immediate demand for the judge's imprisonment for 30 years, the statement by the President of the Supreme Court that the separation of powers weakens the state (ref e), and the National Assembly's decision to establish a judicial review commission -- demonstrates the alarming erosion of due process in Venezuela. Embassy urges Department to take a principled stand on the general issues of due process and the separation of powers, while recognizing that such statements may be used to support potential asylum requests.

DUDDY